No. 12440

# United States
# COURT OF APPEALS
## for the Ninth Circuit

HUGO V. LOEWI, INC., a Corporation,
*Appellant,*

v.

FRED GESCHWILL,
*Appellee.*

## BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.



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## SUBJECT INDEX

TABLE OF CASES

## UNITED STATES CODE



## OTHER STATUTES IN OREGON COMPILED LAWS ANNOTATED



## RULES OF FEDERAL PROCEDURE



## TEXTBOOKS

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Appeal from the United States District Court for the District of Oregon.

## JURISDICTION

This cause was commenced on March 16, 1948, in the Circuit Court of the State of Oregon for the County of Marion, to recover the purchase price of a quantity of hops, the amount for which judgment was demanded being $21,199.70, exclusive of interest and costs (Tr. 2, 7, 16).

Within ten days thereafter, on March 26, 1948, a petition for removal of this cause was filed in said Cir-

cuit Court and an order of removal was entered by the judge of the Circuit Court (Tr. 20, 21), that being within the time allowed by Title 28, U.S.C.A., Section 72, inasmuch as that was at the time or before the defendant was required by Sections 1-602 and 1-801, Oregon Compiled Laws Annotated, to answer or plead to the complaint of the plaintiff. Thereafter, on April 23, 1948, the defendant entered in the District Court of the United States for the District of Oregon, a certified copy of the record in such suit commenced in such Circuit Court (Tr. 23).

This cause was removed to the District Court for the District of Oregon, by the defendant, a nonresident of Oregon, pursuant to Title 28, U.S.C.A., Section 71, this being a suit of a civil nature at law of which the District Courts of the United States were given jurisdiction (Tr. 2, 17, 20). The District Court for the District of Oregon had jurisdiction of this cause by reason of Title 28, U.S.C.A., Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is between citizens of different states, the defendant being a citizen of New York and the plaintiff of Oregon (Tr. 2, 17, 20). Upon the repeal of that section, the District Court had jurisdiction by reason of Title 28, U.S.C.A., Section 1332.

A final judgment was entered in this cause by the District Court, in favor of the plaintiff, on Sept. 30, 1949, for $15,668.18, together with interest and costs (Tr. 43).

This appeal was taken pursuant to Title 28, U.S. C.A., Section 1291. The notice of appeal from such judgment was filed on October 10, 1949 (Tr. 44).

## STATEMENT OF CASE

This is an appeal by the defendant from a judgment for the plaintiff in an action for the contract price of the 1947 crop of cluster hops produced by the plaintiff and contracted to be sold to the defendant. The hops in question were rejected by the defendant as not of the grade, quality and condition required by the contract.

The defendant moved for dismissal of the action on the ground the complaint fails to state a claim against the defendant upon which relief can be granted (Tr. 23-25). This motion was provisionally denied and the legal questions involved were reserved to the trial (Tr. 26). The defendant's answer likewise raises this issue (Tr. 26).

The defendant counterclaimed for $4,000.00 which it advanced to the plaintiff pursuant to the contract as a loan to cover certain production, harvesting and processing costs (Tr. 30, 31).

The case was tried without a jury. The court issued a Memorandum of Decision (Tr. 33), signed (with one change) Findings of Fact and Conclusions of Law prepared by the plaintiff's counsel (Tr. 34-42), and entered judgment (Tr. 43, 44) for the plaintiff for the full contract price less the advances and less proceeds of the plaintiff's resale of the hops after this action was com-

menced, or a net judgment for $15,666.18 plus interest and costs.

This is one of three cases involving similar hop sale contracts which were tried in series by the same court under stipulation and order (Tr. 456) that the testimony in each case shall apply to each other case insofar as material. The other cases are Hugo V. Loewi, Inc., Appellant, v. Kilian W. Smith, Appellee, No. 12441, and John I. Haas, Inc., Appellant, v. O. L. Wellman, Appellee, No. 12442. Each of these cases is now before this court on appeal and the records of all three are consolidated for the purpose of each appeal (Tr. 515-518).

The ultimate issues in this case are (1) whether or not the hops tendered by the plaintiff and rejected by the defendant were of the grade, quality and condition required by the contract, and (2) whether, in the event the hops did conform to the contract requirements, so that the defendant's rejection was a breach of contract, the plaintiff's measure of recovery is the contract price, or is limited by contract and statute to the difference between the contract price and the market value of the hops.

The contract (Tr. 8) provides that the hops shall be

> "not affected by spraying or mold, but shall be of prime quality, in sound condition, of good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition."

The contract provision relative to the measure of damages for any breach of the contract is as follows (Tr. 13):

> "* * * upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

The defendant's rejection of the hops was by reason of damage resulting from downy mildew which attacked the hops prior to harvest (Tr. 465). The plaintiff's complaint was drawn on the theory that the rejection was due to a decline of market price rather than the quality or condition of the hops (Tr. 5). Absolutely no support for this contention, however, was introduced at the trial. The evidence is uncontradicted and conclusive that the market price for such hops remained at or above the contract price until long after the defendant's rejection of the hops (Exhibit 33, Tr. 285; Tr. 361-363, 416, 419).

The contract is for "future goods" in that it provides for delivery in processed and baled form of hops which were being grown when the contract was executed (Tr. 7, 8, 284). The contract is dated August 18, 1947 (Exhibit 1, Tr. 85). The advance and loan of $4,000 provided for in the contract (Tr. 11) was made by check mailed by the defendant to the plaintiff on August 27 (Tr. 98; Exhibit 8, Tr. 85). Harvest of the hops began September 2 (Tr. 76).

Downy mildew is a type of mold which attacks both the hop vines and the hop cones (Tr. 366, 370). Its

effect upon the hop cones may be to kill the hop, resulting in stunted, dead, brown burrs known as "nubbins," or to discolor and prevent the full maturity of the hop, or to discolor to a chocolate brown the petals of the hop (Tr. 144, 145, 367, 368).

The plaintiff first noticed downy mildew in his cluster yard about August 1 (Tr. 141), and by the middle of August about five per cent of his cluster crop was affected by mildew (Tr. 144). At harvest time his 1947 cluster crop was more heavily affected by downy mildew than any previous crop (Tr. 185). The plaintiff acknowledged at the trial that this mildew damage appeared in the baled hops (Tr. 146).

The plaintiff harvested and baled his entire cluster crop, making no effort to avoid the hops affected by mildew (Tr. 140). He did this on his own initiative and without consulting the defendant (Tr. 158).

The defendant's first examination of any of the cluster hops was during harvest early in September, when Lamont Fry, an employee of the defendant's Oregon representative, looked at a handful of unbaled hops in the cooling room of the plaintiff's hop house (Tr. 159-161, 293). Mr. Fry did not, however, go into the hop yard (Tr. 294).

When part of the crop had been baled and placed by plaintiff in a warehouse, Mr. Fry drew two "type" samples of about one pound each (Tr. 294, 295, 347), which were sent to the defendant in New York (Tr. 100, 295). The defendant examined these samples and advised Mr. Paulus, its Oregon representative, that they were of

fair quality but not prime (Exhibits 19, 20, Tr. 85). Thereafter when all the hops, 130 bales, were in the warehouse, three additional type samples were taken and sent to the defendant (Tr. 296, 297, 347; Exhibit 13, Tr. 85), which found them to be of poor quality and badly blighted, and instructed Mr. Paulus to reject such hops (Exhibit 48, Tr. 373). A few days later, and before Mr. Paulus had taken any action on that instruction, the defendant further instructed him to inspect and grade the 130 bales and to send to the defendant 10th bale samples, for the defendant's final decision (Exhibits 17, 23, Tr. 85; Tr. 352-355; Exhibit 30, Tr. 126).

The five type samples which were examined by the defendant in New York are Exhibit 36, A to E (Tr. 371, 374).

Mr. Paulus thereupon informed the plaintiff that the preliminary samples were below the contract standard and that he had instructions to fully inspect the hops and submit to the defendant in New York, representative 10th bale samples for its final decision (Exhibit 4, Tr. 85). Mr. Fry then sampled and weighed the hops in the warehouse, pursuant to written authority by the plaintiff and his express acknowledgment that such acts would not be considered acceptance of the hops (Exhibit 32, Tr. 299, 300). This sampling was done by putting the 130 bales in a line and drawing from each bale a handful of hops, known as "tryings," which were compared with each other to determine whether there was uniformity of grade and condition among all the bales. The bales were then numbered and a large "10th bale sample," weighing about one pound, was cut from each

10th bale, beginning with bale No. 10, or 13 such samples in all. These were compared with the tryings to make sure the 10th bale samples were representative of the entire lot (Tr. 161, 163, 164, 300-303, 389, 498, 499).

Mr. Fry noted that some of the 10th bale samples looked better than the tryings, so he drew additional samples from the opposite side of each bale involved. He found the hops in different parts of those bales to be of different quality or condition, and that the bales were "false packed" (Tr. 305, 306, 310, 317, 389).

A major portion or "split" of each 10th bale sample was mailed to the defendant in New York (Tr. 307; Exhibit 14, Tr. 85), where careful examination revealed that all 13 samples showed clearly a substantial mildew damage. They contained a great many diseased hops or nubbins; they were not of good color, but had an uneven, mottled color due to the brown damaged cones; many of the damaged hops were not fully matured and not in sound condition; the hops in the samples were not in good order and condition (Tr. 433-435, 437). None of the 10th bale samples was considered by the defendant to be of prime quality (Tr. 436), but three of them, from bales 70, 100 and 130, were considered to have a better appearance than the others (Tr. 436). The defendant telegraphed these findings to Mr. Paulus with instructions that although all samples showed many blighted hops the defendant would accept any bales equal to the three better samples, the balance to be rejected as not a prime delivery (Exhibit 26, Tr. 85; Tr. 436, 437).

In addition, Mr. Paulus had general instructions relative to all samples reported by the defendant to be acceptable for delivery, whereby he was required to inspect carefully the lots involved and to reject any bales not fully up to samples or which in his opinion were not of prime quality, and that hops containing considerable blighted burrs were unsatisfactory to the defendant (Exhibit 22, Tr. 85).

Mr. Paulus and Mr. Fry reexamined the samples of the plaintiff's hops in an effort to determine which bales might be accepted as equal to the three better-looking samples referred to by the defendant. They found that although the samples of bales 70, 100 and 130 did look a little better on the surface than the other samples, when broken apart and examined closely they were substantially the same as the others (Tr. 355, 356). Those three samples contained immature, brown nubbins (Tr. 205). Further, Mr. Fry informed Mr. Paulus that he had already reinspected and resampled those bales and found that the hops on the reverse side were the same as all the other bales (Tr. 335, 336, 355).

Mr. Paulus advised the plaintiff that the defendant would consider accepting any hops like the three better-looking samples, and the plaintiff, Mr. Paulus and Mr. Fry together, examined all the samples. The plaintiff agreed that all the samples were substantially the same, and stated that if any particular bales were to be accepted all should be accepted (Tr. 335, 336, 500).

Thereafter, on October 30, 1947, Mr. Paulus on behalf of the defendant notified the plaintiff by letter that

the cluster hops did not meet the requirements of the contract as to grade, quality, character and condition, and therefore could not be accepted, and requested repayment of the $4,000.00 which had been advanced by the defendant to the plaintiff (Exhibit 3, Tr. 85). That advance has not been repaid to the defendant (Tr. 128).

Following rejection of the hops by the defendant, Mr. Paulus at the plaintiff's request attempted to sell the hops to other buyers or to resell them to the defendant at reduced prices, but was not successful (Tr. 120, 121, 337, 338). The plaintiff also attempted to find a buyer (Tr. 121, 131, 208, 209), and during April, 1948, sold and delivered the entire lot of hops for $10,117.51 (Tr. 127, 128, 132, 413).

## SPECIFICATION OF ERRORS

The District Court erred:

1. In finding that by the agreement of August 18, 1947, the plaintiff contracted to sell and the defendant contracted to buy the entire crop of cluster hops grown by the plaintiff in 1947 on his farm, and in basing the judgment thereon (Tr. 35). Such finding is clearly erroneous and is unsupported by substantial evidence, as the agreement itself provides that the defendant was required to accept and pay for only those hops which met the standards of quality and condition specified in the agreement (Tr. 10).

2. In finding that pursuant to said contract the plaintiff duly harvested, cured, and baled said hops

grown thereon in said year in a careful and husbandlike manner, and in basing the judgment thereon (Tr. 36). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled his entire crop, including hops which he knew to be damaged by mildew (Tr. 140). Furthermore, this finding is wholly irrelevant and immaterial.

3. In finding that the defendant knew that said crop of hops showed some mildew at the time said contract was entered into, and knew that said crop would in normal course show such mildew when picked and baled, and in basing the judgment thereon (Tr. 36). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is absolutely no evidence tending to support it (Tr. 98, 148, 151, 153).

4. In finding that the plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state, and in basing the judgment thereon (Tr. 37). Such finding is clearly erroneous and is unsupported by substantial evidence, as the plaintiff acknowledged that he harvested and baled his entire crop, including hops which he knew to be damaged by mildew (Tr. 140). Furthermore, this finding is wholly irrelevant and immaterial.

5. In finding that the plaintiff, with the assent of the defendant, delivered his baled cluster hops to the warehouse and set them aside for the defendant, and appropriated them to the contract, and in basing the judgment thereon (Tr. 37). Such finding is clearly

erroneous and is unsupported by substantial evidence, as there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff. The only evidence on this point is that the defendant, by rejecting the hops, expressed a decided unwillingness to take them as its own.

6. In finding that the plaintiff duly performed all of the terms and conditions of the contract which he was required to perform, and in basing the judgment thereon (Tr. 37). Such finding is clearly erroneous and is unsupported by substantial evidence, if the contract is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

7. In finding that by the term "blighted" it was meant that the hops showed some mildew effect, and in basing the judgment thereon (Tr. 39), if that finding is construed to mean that these hops were rejected because of a slight degree of mildew infestation. Such finding is clearly erroneous and is unsupported by substantial evidence, as the undisputed evidence establishes that the defendant rejected the plaintiff's hops because of substantial damage by mildew (Tr. 433-435, 437).

8. In finding that at the trial the defendant advanced the same specific objection to the hops, that is, that they were blighted, and in basing the judgment thereon (Tr. 39), if that finding is construed to mean that the defendant contended that the degree of mildew infestation

was slight. Such finding is clearly erroneous and is unsupported by substantial evidence, as the evidence is undisputed that the defendant contended at the trial that the plaintiff's hops were substantially damaged by mildew (Tr. 30, 146, 378, 381-384, 436, 481-485, 493-495).

9. In finding that upon the facts the claimed defect was not material, and in basing the judgment thereon (Tr. 39). Such finding is clearly erroneous and is unsupported by substantial evidence, as it is undisputed that if the agreement between the parties is construed in the manner advocated by the defendant, the failure of the plaintiff's hops to meet the standards of grade, quality and condition specified in the agreement, was substantial (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

10. In basing the judgment upon a finding that said cluster hops, when tendered to the defendant, were merchantable (Tr. 39), as hops which are simply merchantable, that is, salable at some price, do not meet the standards of grade, quality and condition specified in the agreement, if it is construed in the manner advocated by the defendant. This finding therefore has no relation whatever to the contract obligation of the plaintiff.

11. In finding that the plaintiff delivered the identical hop crop which the defendant contracted to buy, and in basing the judgment thereon (Tr. 39). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract covered future or unascertained

goods deliverable only after processing (Tr. 8). Furthermore, the defendant agreed to accept and pay for only hops meeting the standards of grade, quality and condition specified in the contract (Tr. 10).

12. In finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon (Tr. 39). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract plainly provides that the defendant was not obligated to accept and pay for any hops tendered to it which did not meet the standards of grade, quality and condition specified in such contract (Tr. 10). In the absence of evidence to the contrary, it must be conclusively presumed that the defendant did rely upon the warranty in the contract; there was no such evidence.

13. In finding that said hops were of substantially the average quality of Oregon cluster hops accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions, and in basing the judgment thereon (Tr. 39, 40). Such finding is clearly erroneous and is unsupported by substantial evidence, and does not form a proper basis for the judgment, as the contract cannot be construed to mean that average quality hops meet the standards of grade, quality and condition specified therein. Furthermore, such finding is wholly irrelevant

and immaterial.

14. In finding that the defendant found that a portion of said hop crop was acceptable, and that, in fact, the entire crop was substantially of the same quality as the part thereof which defendant found acceptable, and in basing the judgment thereon (Tr. 40). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is absolutely no evidence to support it (Tr. 301, 304-306, 309, 310).

15. In finding that said hops, upon tender and delivery, substantially conformed to the quality provisions of the written agreement of August 18, 1947, and in basing the judgment thereon (Tr. 40). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

16. In finding that there had been a material decline in the general market price and demand for 1947 Oregon cluster hops and that the hops here involved could not readily be resold, and in basing the judgment thereon (Tr. 40). Such finding is clearly erroneous and is unsupported by substantial evidence, as this finding is contrary to the undisputed evidence in this case (Exhibit 33, Tr. 285; Tr. 361-363, 416, 419).

17. In finding that the defendant was in default in the payment of the purchase price of said hops and that $15,666.18 was due and owing from the defendant, as the undisputed evidence in this case establishes that, if

this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

18. In deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties on his part to be performed (Tr. 41). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

19. In deciding that the property in said cluster hops passed to the defendant (Tr. 42), as this decision is contrary to law for three reasons: (1) The contract provides that title shall pass to the defendant only when the defendant tenders to the plaintiff the contract price of the quantity of hops accepted by the defendant. No such tender was ever made as the defendant rejected all of the plaintiff's hops. (2) As this was a sale for cash, title did not pass to the defendant as the defendant has never paid for the hops. (3) If this was not a sale for cash or cash on delivery, title did not pass as the hops did not meet the standards specified in the contract and the conditional assent of the defendant to the appropriation of the hops, implied from the delivery of the hops to the warehouse by agreement, was withdrawn by the rejection of such hops.

20. In deciding that the defendant became obligated to pay the plaintiff on or before October 31, 1947, the sum of $21,209.20, being the contract price of $25,209.20 less the advance payment of $4,000.00 (Tr. 42), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

21. In deciding that the defendant wrongfully refused to and did not perform its obligation under said contract of August 18, 1947 (Tr. 42), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 146, 378, 381-384, 436, 481-485, 493-495).

22. In deciding that the measure of the plaintiff's recovery upon the facts in this cause is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale of the plaintiff's hops (Tr. 40, 41, 42), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 13). The plaintiff is bound by that provision.

23. In failing and refusing to apply the provision in said contract of August 18, 1947, which fixed and determined the measure of damages as the difference between the contract price of the hops and the market value thereof at the time and place of delivery (Tr. 40, 41, 42), as the plaintiff is bound by that provision.

24. In deciding that the defendant should take nothing under its counterclaim (Tr. 42), as the defendant is entitled to a judgment against the plaintiff on its counterclaim for $4,000.00, the amount of the loan and advance to the plaintiff, in the event of a reversal of the judgment, the said sum not having been repaid to the defendant (Tr. 128).

25. In failing and refusing to grant the motion to dismiss filed on behalf of the defendant (Tr. 23, 26), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference between the contract price of said hops and the market value thereof at the time and place of delivery (Tr. 13). The plaintiff is bound by that provision.

## ARGUMENT

### Summary of Argument

I. The findings of fact with respect to the quality and condition of the hops tendered by the plaintiff to the defendant, are clearly erroneous and are unsupported by any substantial evidence.

II. The defendant was not bound to take delivery of the plaintiff's hops and was justified in rejecting them.

III. The court erred in concluding as a matter of law that the plaintiff substantially performed all of the terms and conditions of the agreement on his part to be performed, and that the defendant wrongfully refused to and did not perform its obligation under said contract.

IV. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the facts of this case do not bring it within the operation of the provisions of the Uniform Sales Act which permit such an action.

V. The court erred in concluding as a matter of law that the property in the plaintiff's cluster hops passed to the defendant, and that the defendant became obligated to pay the plaintiff the amount due under said contract less the amount realized from the resale of the hops.

VI. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the contract itself precludes that measure of recovery.

VII. The court erred in failing and refusing to grant the defendant's motion to dismiss on the ground stated in paragraph 1 thereof (Tr. 23, 26), and in failing and refusing to sustain the first defense in the defendant's answer (Tr. 28).

VIII. The court erred in concluding as a matter of law that the measure of the plaintiff's recovery upon the facts here is, under Oregon law, the difference be-

tween the amount due under said contract and the amount realized from the resale of the hops.

IX. The defendant is entitled to a judgment against the plaintiff on its counterclaim (Tr. 30), for $4,000, the amount of the advance, in the event the judgment is reversed.

## I

## THE FINDINGS OF FACT WITH RESPECT TO THE QUALITY AND CONDITION OF THE HOPS TENDERED BY THE PLAINTIFF TO THE DEFENDANT, ARE CLEARLY ERRONEOUS AND ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE

The defendant contends that no substantial evidence was introduced tending to establish that the hops tendered by the plaintiff to the defendant met the standards of quality and condition specified in the contract of sale.

The contract contains this provision with respect to quality and condition (Tr. 8):

> "Such hops shall not be the product of the first year's planting, and not affected by spraying or mold, but shall be of prime quality, in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition."

The portions of the Findings of Fact claimed to be clearly erroneous and not supported by any substantial evidence, will be considered in some detail.

**1. Paragraph 12 of Findings of Fact (Tr. 39, 40):**

> "Said hops were of substantially the average quality of such Oregon cluster hops actually accepted in 1947 by the hop trade generally and by defendant under contracts containing the same type of quality provisions. * * * Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said agreement."

These findings are really three in number. They can be more readily understood and discussed if rephrased as follows:

(a) Hops which are of average quality and condition conform to the warranty contained in the contract.

(b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

(c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

**1. Paraphrase of Paragraph 12 of Findings of Fact (Tr. 39, 40):**

(a) Hops which are of average quality and condition conform to the warranty contained in the contract.

The plaintiff attempted to establish that the term "prime quality" found in the warranty means "average quality for the year in which the hops are grown, in the Willamette Valley" (Tr. 179, 188, 189, 239). One wit-

ness who testified for the plaintiff, however, acknowledged that "prime quality" hops are those which are well grown, harvested and cured, of good even color, and free of damage by vermin or disease (Tr. 259).

The defendant introduced testimony which establishes that the expression "prime quality" means exactly what the rest of the warranty specifies, in other words, that the term "prime quality" must be deemed to mean hops which are not the product of the first year's planting and not affected by spraying or mold but which are in sound condition, good color, fully matured, cleanly picked, free from damage by vermin, properly dried, cured and baled, and in good order and condition (Tr. 395, 396, 410, 411, 428, 429). The expression "prime quality" also means that the hops must be free of damage by disease, such as mildew (Tr. 259, 399, 401, 402, 410, 411, 433).

The witnesses produced by the defendant who testified to the meaning which should be given to the words "prime quality," were men who have been in the hop business in Oregon for many years as growers and buyers. Their testimony establishes that the expression "prime quality," were men who have been in the hop which is the same in California, Oregon and Washington, and is the same from one year to the next. This definite standard has been applied in each of these states for many years (Tr. 278, 279, 403, 412, 429, 431).

That the defendant's contention with respect to the meaning which should be given to the term "prime quality," is correct, is amply demonstrated by two decisions

of the Supreme Court of Oregon and one decision of the United States Circuit Court for the District of Oregon.

*Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636, was an action to recover advances made by the buyer to the grower. The principal issue was whether the hops tendered to the plaintiff and rejected by him, were of the quality specified. The contract described the hops to be delivered in these words:

> "The said hops covered by this instrument shall be of first quality, i.e. of sound condition, good and even color, fully matured, but not overripe, flaky, cleanly picked, properly dried and cured, and free from sweepings and other foreign matter, and not affected by spraying or vermin damage. Said hops shall not be the product of a first year's planting."

In discussing whether the trial court ruled correctly in admitting testimony of an expert witness with respect to a chemical analysis of the hops involved, the court said that the contract "defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality." (See Appendix 1.)

The Supreme Court also considered whether certain instructions requested by the plaintiff concerning quality and condition, should have been given. In that connection, the court said, "We think the description of the hops as specified in the contract was determinative of their quality." (See Appendix 2.)

These quotations indicate plainly that the terms "first quality" and "prime quality" in contract provisions such as these, are to be construed in conformity

to the remaining specific requirements in such provisions, and that hops cannot be of "first quality" or "prime quality" unless they meet those specific requirements.

*Wigan v. La Follett,* 84 Or. 488, 165 Pac. 579, was also an action to recover advances made pursuant to a hop contract, the plaintiff having rejected the hops tendered. Here the issue was whether the hops tendered were of "prime quality." The trial court instructed the jury to "accept the definition of prime quality as laid down in this contract by the parties themselves." This instruction was approved by the Supreme Court. (See Appendix 3.)

*Lilienthal v. McCormick,* 86 Fed. 100, is also believed to be of great importance for the reason that the Circuit Court for the District of Oregon decided that hops of a quality equal to the average of the best produced, did not comply with the terms of the contract which required the hops to be "of choice quality, and in sound condition, of good color, fully matured, etc." That was a suit in which the plaintiff, the buyer, sought a lien upon certain hops of the defendant, the seller, to the extent of advances made to the latter. In sustaining an exception to the defendant's answer, the court said that the allegation that the crops tendered were an average of the best product of said crops so produced did not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc. (See Appendix 4.)

The decree entered by the court in that case was affirmed by the Circuit Court of Appeals in *Lilienthal v. McCormick,* 117 Fed. 89.

The defendant contends that these authorities establish that the term "prime quality" does not mean "average quality for the year in which grown," but that it does mean that the hops shall not be the product of the first year's planting and they shall not be affected by spraying or mold, but shall be of good color, fully matured, cleanly picked, free from damage by vermin or disease, properly dried, cured and baled, and in good order and condition.

This conclusion is supported by certain practical considerations which are of great importance.

In the first place, if the term "prime quality" means "the average quality for the year in which grown, in the Willamette Valley," it follows that if all or nearly all of the hops in the Willamette Valley are badly damaged by mildew in any year, the buyers are bound to accept badly damaged hops from the Oregon growers in that year, regardless of the fact that such buyers are either obligated to deliver to brewers hops of top quality, or would be unable to sell hops of any other grade than top quality. If the buyers are bound to take badly damaged hops simply because they are average hops for the year, in the Willamette Valley, buyers are bound to take hops at the contract price which they will not be able to sell.

This means that the buyers, who have no control whatsoever over the hops, would have to assume the

risk of a poor year and pay top prices for a product which they would not be able to sell or which would bring reduced prices at best. It is true that growers do not have complete control over the quality of hops produced by them, but they have elected to engage in the business of growing hops and from time immemorial farmers and growers of all products have had to assume the risk of poor crops.

It was the plaintiff and not the defendant who undertook to harvest, cure and bale the good hops on the vines. It was the plaintiff and not the defendant who assumed the risk of growing, harvesting, curing and baling the hops in such a manner as to make certain that they were good hops when baled.

The contract itself clearly contemplates that the plaintiff should assume the risk of growing, harvesting, curing and baling hops of the quality and condition warranted. It is expressly provided in paragraph "Second" (Tr. 10), that the defendant should have the right to inspect the baled hops delivered to the warehouse, and to reject those not meeting the warranty.

Section 281 of the Restatement of the Law of Contracts, clearly indicates that in the absence of an agreement to the contrary, it is the grower who assumes the risk of a crop failure, and not the buyer. (See Appendix 5.)

In the second place, if a buyer of prime quality hops must accept average hops, the freedom of the buyer to contract for future requirements would be so seriously impaired as to be very nearly destroyed. No

brewer would purchase his requirements without a guarantee of quality, and it is equally true that no buyer would undertake to meet the guarantee without protection in his contracts with growers.

Finally, if "prime quality" means "average quality grown during a particular year," there is an inconsistency in the contract in that a quantity of hops might be acceptable as average hops and at the same time wholly unacceptable because not of even color, or not well and cleanly picked, or because not free of damage by disease.

It is well settled, of course, that all the terms of a contract must be taken into account in determining its meaning, and that all must be harmonized, if possible.

> *Hardin v. Dimension Lumber Co.,* 140 Or. 385, 13 Pac. 2d. 602.

The application of that principle requires a determination that the term "prime quality" cannot be held to mean the "average quality of hops for the year in which grown."

It is respectfully contended on behalf of the defendant that these authorities establish that the term "prime quality" must be construed in the manner advocated by the defendant, that is, it means exactly what the remaining terms in the warranty specify.

**1. Paraphrase of Paragraph 12 of Findings of Fact (Tr. 40):**

(b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

Witnesses produced by the plaintiff testified that his hops were of "average" quality or "good average" quality (Tr. 176, 210, 222).

The plaintiff, on direct examination, testified that his hops were of prime quality (Tr. 134), but during cross-examination he admitted that what he meant by the term "prime quality" was "average quality for the year in which grown, in Oregon" (Tr. 175, 176). He testified that his hops were equal to the average produced in Oregon during 1947 (Tr. 134, 135, 174, 175).

All of this testimony was directed to the question whether the plaintiff's hops were of average quality for the year in which grown, in the Willamette Valley. None of it had any bearing on the real issue whether the plaintiff's hops were of "prime quality" as that term is defined in the warranty.

The testimony introduced by the defendant, on the other hand, establishes that this plaintiff's hops were heavily damaged by mildew (Tr. 378), and that they were therefore not of prime quality, and were not "in sound condition," or of "good color," or "fully matured," or "in good order and condition," as expressly required by the contract (Tr. 8, 433, 434, 483, 484, 490, 494, 495).

The analysis made by Mr. G. R. Hoerner, bacteriologist of the Oregon State College and U. S. Department of Agriculture, specializing in a study of downey mildew in hops, is of great significance. The hop samples furnished to Mr. Hoerner were separated by him for this test in the same manner as that used by the Federal-State Inspection Service in making the determination

of leaf and stem content which is accepted by both growers and buyers throughout the hop industry in this area as a factor in the determination of prices (Tr. 376, 478, 479). Mr. Hoerner's test produced the following results: 70.1% by weight of one sample showed infected burrs, petals and nubbins; 60.44% by weight of the other sample showed infected burrs, petals and nubbins (Tr. 378, 381, 503). An examination of Exhibit 49C (Tr. 373, 377) and Exhibit 50E (Tr. 373, 380) will demonstrate beyond any doubt that the infected portions of these two samples were not simply exterior petals and that these hops were heavily and seriously damaged by mildew.

The samples thus analyzed by Mr. Hoerner were from among the original 10th bale samples drawn from the bales when the hops were first sampled at the warehouse (Tr. 318, 319, 321). One of these was among those which had been sent to the defendant's New York office and had been examined by Mr. Oppenheim there. It was representative of all of the 10th bale samples (Tr. 339, 340).

Mr. Hoerner also examined on the witness stand four additional 10th bale samples. Two of these he found to show many mildewed, diseased hops and nubbins (Tr. 382, 383), and the others to show definite evidence of mildew (Tr. 384).

These tests were strongly supported by the testimony of the witnesses produced by the defendant. Mr. Ray and Mr. Farmer examined all of the 10th bale samples which were produced in court, 13 in number. Mr. Ray

testified that, with the exception of one sample which might be regarded as of prime quality by stretching, these hops could not possibly be of prime quality because of the mildew damage (Tr. 481, 482, 483). He said that they contained a very considerable number of nubbins and that there was no reasonable chance among experts for a difference of opinion (Tr. 483, 484). Mr. Franklin testified that these hops were seriously damaged by mildew and were not of prime quality (Tr. 493, 494, 495). Mr. Oppenheim, president of the defendant, testified that he personnally examined these samples and rejected the hops because the samples contained a great many hops blighted by mildew. He said that the color of the individual undamaged hops was reasonably good but added that the color of the crop as baled was not good because of the nubbins and other mildew damage (Tr. 433, 434).

The one sample referred to by Mr. Ray as being better than the others, was undoubtedly taken from a bale in which the hops were not uniform in quality and condition. This is discussed under this heading I, subdivision 3.

It will be evident that the plaintiff's witnesses directed their testimony to the question whether his hops were of average quality, and that the defendant's witnesses directed their testimony to the question whether such hops were of "prime quality" as that term is defined in the warranty itself.

It is equally evident that if the court construes this contract in the manner advocated by the defendant, it

must be said that there is no substantial evidence tending to establish that the plaintiff's hops were of prime quality.

**1. Paraphrase of Paragraph 12 of Findings of Fact (Tr. 40):**

(c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

In the first place, it is well settled that evidence of collateral transactions is not relevant when offered to establish the terms of a contract between the parties or that it was breached by one of them, for the reason that the rights of the parties can not be affected or concluded by such collateral transactions.

*Chapman v. Metropolitan Life Ins. Co.,* 172 S.C. 250, 173 S.E. 801.

*Agri Mfg. Co. v. Atlantic Fertilizer Co.,* 129 Md. 42, 98 Atl. 365.

*Johnson v. Associated Oil Co. of California,* 170 Wash. 634, 17 Pac. 2d. 44. (See Appendix 6.)

In the second place, there is no evidence in support of the finding now being considered, except such as is so indefinite as to be wholly meaningless.

**2. Paragraph 11 of Findings of Fact (Tr. 39):**

"Said hops when tendered were merchantable."

It may be assumed that this finding of merchantability should be construed to mean that the plaintiff's hops were of average quality and condition, and that the defendant was therefore bound to take them, as there is an express finding to that effect in Paragraph 12 (Tr. 39, 40). If so, it adds nothing to the latter.

If this finding of merchantability is construed to mean something else, there is only one clue in the findings to its proper construction.

All we know is that the court must have intended to find that the hops were not of "prime quality," if that expression is given the meaning advocated by the defendant.

That conclusion is supported by these facts which can be verified by referring to the Finding of Facts and Conclusions of Law on file in this cause:

Counsel for the plaintiff proposed this finding with respect to quality and condition:

> "Said 1947 crop hops produced by plaintiff on said premises and tendered to the defendant under said contract were merchantable, were not affected by mold, were in sound condition and in good order and condition, and were substantially fully matured, of good color, and of prime quality."

The court struck out those words and inserted this finding in their place, in longhand:

"Said hops when tendered were merchantable."

This finding is subject to such broad and varied interpretations that it has no materiality in this litigation.

Furthermore, the word "merchantable" is not used in the warranty appearing in the contract nor is there any evidence ascribing to it any meaning by custom or usage, or otherwise.

The testimony shows that on some occasions when hops failed to meet the quality requirements of contracts, the buyers accepted them at reduced prices. In fact, the testimony indicates that in 1947 a considerable portion of the mildew-affected crop was sold at reduced prices. When hops failed to meet the quality provisions of contracts, it was simply a matter of negotiation of new "spot" sales at prices lower than provided in the contracts and based upon the lower quality of the hops (Tr. 337, 338, 439, 445, 446). Consequently, when it is said that a particular lot of hops is "merchantable," that means simply that the hops are salable at some price, either the market price of prime quality hops, or some other price possibly substantially less than that figure.

This finding that the hops were "merchantable" is just as immaterial as the allegation in *Lilienthal v. McCormick,* 86 Fed. 100, that the grower's hops were equal in quality to the "average of the best product of the crop produced." With respect to that allegation, the court said:

> "The allegation that the crops tendered were an average of the best product of said crops so produced does not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc."

The two Oregon cases dealing with the construction to be placed on the warranty in this contract, *Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636, and *Wigan v. LaFollett,* 84 Or. 488, 165 Pac. 579, also establish that the finding of merchantability in the present case has no bearing upon this controversy.

In *Netter v. Edmunson,* supra, the court made this statement:

> "Therefore, the contract under consideration defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality."

In *Wigan v. LaFollett,* supra, the court said:

> "You are to accept the definition of prime quality as laid down in this contract by the parties themselves."

It follows that the finding of merchantability is wholly immaterial as it does not determine any issue in this case.

### 3. Paragraph 12 of Findings of Fact (Tr. 40):

> "Defendant found that a portion of said crop was acceptable, and in fact the entire crop was substantially of the same quality as the part thereof which defendant found acceptable."

There is not the slightest evidence in support of that finding.

It is true that when the 10th bale samples, 13 in number, were submitted to Mr. Oppenheim, he stated that numbers 70, 100, and 130 appeared to be better

than the other 10, and notified Mr. Paulus, his representative in Oregon, that he was willing to accept any bales reasonably free of blighted hops and equal to these three samples (Tr. 473; Exhibits 23, 26, Tr. 85). Mr. Paulus then checked with Mr. Fry, his employee, who had drawn these samples of the plaintiff's hops. Mr. Fry reported he had taken another sample from the other side of each of these three bales and found that these new samples did not measure up in quality to the samples taken originally from those bales, showing that those bales were not of uniform quality (Tr. 301, 304, 305, 306, 309, 310).

In his testimony describing this lack of uniformity in these three bales, Mr. Fry used the term "false packed" (Tr. 309). On rebuttal, the plaintiff testified that he had never heard the term "false packed" until "last week in Portland," presumably when the deposition of Mr. Fry was taken (Tr. 497). The important fact, however, is that Mr. Fry made the additional test of each of the three bales mentioned, with the result noted, and not whether he used the term "false packed" or any other term in describing those results. While this plaintiff may have denied that he ever heard that term before, he did not deny that Mr. Fry made the test referred to or that such test produced the result stated. He did not deny that Mr. Fry did what he said he did, or found what he said he found. He acknowledged, in fact, that such a re-sampling may have been made (Tr. 501).

**4. Paragraph 11 of Findings of Fact (Tr. 39):**

"By the term 'blighted' it was meant that the hops showed some mildew effect as stated above."

If, by the use of the word "some," counsel for the plaintiff who drafted these findings, intended to convey the impression that the defendant rejected these hops on the ground that they were infected with mildew in a minor degree, this finding is without any evidence whatever in its support. The testimony of several witnesses produced by the defendant establishes that the plaintiff's hops were heavily infected with mildew (Tr. 375-386, 407, 482-485, 492-495). One of the witnesses who so testified was Mr. Oppenheim, president of the defendant. It was he who rejected these hops because of the serious nature of the blight (Tr. 433, 434, 465), and the correspondence introduced in evidence so indicates (Exhibits 17, 19, 22, 23, 26, Tr. 85; Exhibits 47, 48, Tr. 373).

One other finding should be challenged as it was intended to cast doubt upon the good faith of the defendant in rejecting the plaintiff's hops. That finding, in paragraph 13 (Tr. 40), is in these words: "There had been (presumably prior to the rejection of the plaintiff's hops by the defendant on or about October 30, 1947), a material decline in the general market price and demand for 1947 Oregon cluster hops."

No evidence whatever was introduced in support of that finding. The market price of hops did not decline prior to the latter part of November, 1947. Mr. R. M. Walker, who was produced as a witness by the plaintiff,

acknowledged that the market price of prime hops remained at 85¢ and 90¢ until the end of November, 1947 (Tr. 246). Mr. Ray and other witnesses testified that there was a scarcity of prime quality hops in 1947 and that there was a good market for them throughout 1947 (Tr. 362, 405, 470, 475, 476), and that the market price for hops of the type then available began to decline during the latter part of November (Tr. 246, 247; Exhibit 33, Tr. 285).

### 5. Paragraph 11 of Findings of Fact (Tr. 39):

> "Upon the facts the claimed defect (that the plaintiff's hops were blighted) was not material."

While the materiality of the objection advanced by the defendant is probably a mixed question of law and fact, it is clear that, insofar as the finding is one of fact, it is unsupported by any substantial evidence.

The oral testimony produced by the defendant shows that the plaintiff's hops were seriously or heavily damaged by mildew. The test conducted by Mr. Hoerner of Oregon State College, shows that from 60% to 70%, by weight, of the samples of the plaintiff's hops tested by him, consisted of infected burrs, petals and nubbins (Tr. 378-382).

### 6. Paragraph 12 of Findings of Fact (Tr. 39):

> "Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of hops would be any different in condition or quality than said crop actually was when tendered and delivered as aforesaid."

There is no testimony whatever which remotely tends to support that finding. Both of these parties signed this contract containing the express warranty we have been considering, and it must be conclusively presumed that the defendant would not have entered into this contract if it had not expected and desired to receive prime quality hops, at least in the absence of substantial proof to the contrary. There was no such evidence.

In this connection, it seems advisable to challenge an additional finding, in paragraph 4 (Tr. 36): "Defendant knew that said hop crop then (when the parties entered into the contract) showed some mildew and would in normal course show such mildew when picked and baled."

This finding is likewise without any support in the testimony. The plaintiff himself admitted that he did not know whether any one representing the defendant saw the plaintiff's hops on the vines before or at the time the contract was signed (Tr. 98, 148, 151, 153).

The plaintiff further acknowledged that he did not inform the defendant or any of its representatives that his cluster hops were affected by mildew, although he knew when the contract was signed that at least 5% of his cluster hop yard was affected (Tr. 141-144, 152). The only time anyone representing the defendant saw any of the plaintiff's cluster yard, in 1947 prior to the execution of this contract, was early in August when Lamont Fry drove past about 300 feet of the yard (Tr. 291, 292). There is no evidence that mildew in that yard was then noticed by, or was known to Mr. Fry.

**7. Paragraph 3 of Findings of Fact (Tr. 36):**

"Pursuant to said contract, plaintiff cultivated and completed the cultivation of said premises and duly harvested, cured and baled said hops grown thereon in said year in a careful and husbandlike manner."

**8. Paragraph 7 of Findings of Fact (Tr. 37):**

"Plaintiff did everything he was bound to do for the purpose of putting the specific crop of cluster hops in a deliverable state * * *."

**9. Paragraph 7 of Findings of Fact (Tr. 37):**

"Plaintiff duly performed all of the terms and conditions of the agreement between the parties on his part to be performed."

If what has been said in the argument under this heading I is correct and sound, the plaintiff did not do everything that he was bound to do under the contract, in that he failed to tender hops of prime quality. If he used the utmost care, he must still suffer the penalty of rejection as his hops did not comply with the warranty.

If the court construes the term "prime quality" to mean what the other expressions in the warranty specify, and to mean that the hops must be free of damage by mildew, it follows from what has been stated herein that the plaintiff has produced no evidence whatever that his hops met the standards of quality and condition expressed in the contract of sale.

The defendant respectfully contends that under these circumstances the findings discussed herein are clearly erroneous and should be set aside by reason of Rule 52 (a), Federal Rules of Civil Procedure, Title 28, U.S. C.A., following Section 723c.

This court has held, in conformity to a decision of the United States Supreme Court, that a finding of fact is not conclusive and is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

*United States v. United States Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746, 766.
*Grace Bros., Inc. v. Commissioner of Internal Revenue,* 173 Fed. 2d. 170 (C.A.-9).
*Lassiter v. Guy F. Atkinson Co.,* 176 Fed. 2d. 984 (C.A.-9).

In *United States v. United States Gypsum Co.,* supra, the Supreme Court set aside a number of findings of fact made by the District Court on the ground that they were clearly erroneous.

The defendant respectfully contends that the present case is one in which the evidence is such as to create a definite and firm conviction that a mistake has been made, and that these findings likewise should be set aside.

## II

## THE DEFENDANT WAS NOT BOUND TO TAKE DELIVERY OF THE PLAINTIFF'S HOPS AND WAS JUSTIFIED IN REJECTING THEM

Assuming that the conclusions stated in the argument under heading I are sound and that the hops tendered to the defendant did not meet the standards

of quality and condition specified in the contract of sale, the defendant was not bound to take delivery of such hops and was justified in rejecting them.

It is well settled that goods must be of the quality described in the contract; if they are not, the buyer is not bound to accept them and can refuse to receive them.

*Wright v. Ramp,* 41 Or. 285, 68 Pac. 731. (See Appendix 7.)

*Barron County Canning & Pickle Co. v. Niana Pure Food Co.,* 191 Wis. 635, 211 N.W. 764.

*Corbett v. A. Freedman & Sons, Inc.,* 263 Mass. 391, 161 N.E. 415.

A buyer has a right to performance of the contract of sale in accordance with its terms, and it is no excuse to the seller that some other performance should be just as satisfactory or serviceable. This is established by the following decisions which are briefly discussed.

*Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636. This was an action to recover advances made to a hop grower, in which the latter counterclaimed for damages sustained through the failure of the buyer to accept his hops. The court said that while an application of scientific methods may have demonstrated that the rejected hops would have made excellent beer, equal to that made with first quality hops, the defendants were still under a legal obligation to deliver to plaintiffs hops of the kind and quality described in the contract. (See Appendix 1.)

*Hurley Gasoline Co. v. Johnson Oil Refining Co.,* 118 Okla. 26, 246 Pac. 438. The contract called for a specified grade of gasoline, the description of which stated about six different requirements, one of which was that the gasoline should be "water white." The gas actually shipped was yellow. The trial court held as a matter of law that the gas shipped was not of the quality required. This conclusion was upheld on appeal. (See Appendix 8.)

*Niederhauser v. Jackson Dairy Co.,* 213 Ia. 285, 237 N.W. 222. The buyer was held to have been justified in refusing to accept milk tendered to him on the ground that the seller failed to have his cows given a tuberculin test as agreed. The court reached this decision in spite of the fact that tests conducted after the rejection of the milk disclosed that the seller's herd was free from tuberculosis.

*Welch v. T. M. Warner Co.,* 47 Fed. 2d. 232 (C.C.A. 2). In an opinion written by Judge L. Hand, the court decided that a seller must tender goods of the described quality, and that it is insufficient that a substitute tendered by the seller is substantially as serviceable as the goods stipulated. Many cases are cited in this opinion.

A number of decisions will be cited herein and briefly discussed, to demonstrate that the defendant was justified in rejecting the plaintiff's hops.

*Klinge v. Farris,* 128 Or. 142, 268 Pac. 748, 273 Pac.

954. The seller was bound to furnish foxes having 50% silver. The court held that foxes having 25% silver did not meet the specifications of the contract.

*Lilienthal v. McCormick,* 86 Fed. 100 (Circuit Court for the District of Oregon). The court held that hops of a quality equal to the average of the best produced, did not comply with the terms of the contract which required the hops to be "of choice quality, and in sound condition, of good color, fully matured, etc."

*Hageman v. Ule,* 188 Wis. 617, 206 N.W. 842. The seller was required to furnish gravel without any sand content. A quantity of gravel when first tendered to the buyer contained from 5% to 20% of sand. This material was then rescreened and the amount of sand materially reduced. The court held, however, that even in that condition it did not comply with the terms of the contract.

*Hurley Gasoline Co. v. Johnson Oil Refining Co.,* 118 Okla. 26, 246 Pac. 438. The gas shipped by the seller failed to meet the contract specifications in only one respect, yet the trial court held that this gas was not of the quality required. This conclusion was upheld on appeal, the court saying:

> "Where an article is sold according to a particular description, and the thing delivered is not according to the description, it is a non-performance of the contract upon the part of the seller."

*Swift & Co. v. Aydlett,* 192 N.C. 330, 135 S.E. 141. The contract called for a commercial fertilizer of a guar-

anteed chemical analysis. The fertilizer delivered contained ingredients of a different analysis. The court held that the buyer was not obligated to accept it, saying:

> "A vendor, who, by his contract, has agreed to sell and deliver to his vendee commercial fertilizer cannot recover of his vendee the purchase price of said fertilizer unless in his action to recover same, he alleges and proves delivery, pursuant to his contract, of commercial fertilizer containing chemical ingredients of the analysis guaranteed, as required by statute."

*Myers v. Anderson,* 98 Colo. 394, 56 Pac. 2d. 37. The seller here was obligated by contract to furnish milk having a bacteria count no greater than allowed by city ordinance. The milk furnished had a higher bacteria count. The court held as a matter of law, reversing the trial court, that the buyer was not bound to accept the milk furnished.

*Baker v. J. C. Watson Co.,* 64 Idaho 573, 134 Pac. 2d. 613. The court said:

> "If the contract was for U. S. No. 1's (peaches) appellant (buyer) was required to accept only peaches of such grade."

*Peck v. Hixon,* 47 Idaho 675, 277 Pac. 1112. The contract here required the seller to deliver 116 "white-faced and Durham" steers. The seller tendered among the entire number, three or four Angus and several Jerseys. The court held that the buyer was not obligated to accept the steers tendered, saying:

> "There was not a substantial compliance by appellant (seller) with the requirement of the contract as to the kind of steers called for. It was not sufficient that those not of the quality stipulated were in fact merchantable. Respondents (buyers) were required to take only 'white-faced and Durham' steers."

*Central Wisconsin Supply Co. v. Johnston Bros. Clay Works,* 194 Ia. 1126, 190 N.W. 961. In that action for the price, a judgment based upon a directed verdict for the defendant, was affirmed on appeal. The plaintiff agreed to deliver "Harrisburg, Ill., 2″ lump coal." The basis for the decision was that there was no evidence that the plaintiff tendered that kind of coal.

*U. S. Electric Fire-Alarm Co. v. City of Big Rapids,* 78 Mich. 67, 43 N.W. 1030. The plaintiff contracted to install for the defendant an alarm bell having a tone of A below middle C. The bell furnished had a tone of E flat, but it was perfect in every other respect. There was evidence that this bell was not suitable because it could not be heard easily by the city firemen in their homes or places of business. The court held that the defendant was not liable for the price.

It is respectfully contended on behalf of the defendant that these authorities establish that inasmuch as the hops tendered to the defendant were not of the kind, quality and condition described in the contract, the defendant was not bound to accept delivery of such hops and was justified in rejecting them.

## III

## THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PLAINTIFF SUBSTANTIALLY PERFORMED ALL OF THE TERMS AND CONDITIONS OF THE AGREEMENT ON HIS PART TO BE PERFORMED, AND THAT THE DEFENDANT WRONGFULLY REFUSED TO AND DID NOT PERFORM ITS OBLIGATION UNDER SAID CONTRACT

This is established by the argument under headings I and II, which is incorporated herein by reference.

## IV

## THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE FACTS OF THIS CASE DO NOT BRING IT WITHIN THE OPERATION OF THE PROVISIONS OF THE UNIFORM SALES ACT WHICH PERMIT SUCH AN ACTION

An action for the price can be maintained only when authorized by Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A. (See Appendix 9.)

*Dodd v. Stewart,* 276 Pa. 225, 120 Atl. 121.

*Henry Glass & Co. v. Misroch,* 239 N.Y. 475, 147 N.E. 71.

*Funt v. Schiffman,* 115 N.Y. Misc. 155, 187 N.Y. S. 666.

## Section 63(3) of the Uniform Sales Act

Section 63(3) of the Act, Section 71-163(3), O.C.L. A., does not authorize a recovery of the price in this action for the reason that no attempt was made at the trial to prove that the plaintiff notified the defendant that the hops would thereafter be held by the plaintiff as bailee for the defendant. There is not the slightest evidence in this case that the plaintiff gave such notice to the defendant.

Notification to the buyer that the seller holds the goods as bailee for him, is essential to a recovery under Section 63(3).

*Cohen v. La France Workshop, Inc.,* 112 Pa. Super. 307, 171 Atl. 90.

The burden of proof is on the seller to establish that he gave such notice to the buyer; and if he fails to meet that burden, he is not entitled to a recovery under this section.

*Western Hat & Manufacturing Co. v. Berkner Bros., Inc.,* 172 Minn. 4, 214 N.W. 475.

*J. & W. Tool Co. v. Schulz,* 140 N.Y. Misc. 652, 251 N.Y.S. 509.

Inasmuch as the giving of notice by a seller to a buyer after the rejection of the goods sold to the latter, that the seller will thereafter hold the goods as bailee for the buyer, is essential to a recovery under Section

63(3) of the Act, it follows that the plaintiff is not entitled to a recovery under that Section.

## Section 63(1) of the Uniform Sales Act

Section 63(1) of the Act, Section 71-163(1), O.C.L.A., does not authorize a recovery of the price in this action for the reason that the property in the hops referred to in the plaintiff's complaint has not passed to the defendant within the meaning of that section.

Section 19 of the Uniform Sales Act, Section 71-119, O.C.L.A., contains a number of rules which are applied, unless a different intention appears, in determining when it can be said the parties intended title to pass to the buyer. (See Appendix 10.)

Section 20(1) of the Act, Section 71-120(1), O.C.L.A., declares that the seller may, in the contract of sale, reserve the right of possession or title to the goods until certain conditions have been fulfilled. (See Appendix 11.)

The defendant contends that when these provisions of the statute are applied to the facts of this case, it must be concluded that title to the hops referred to in the complaint has not passed to the defendant. This conclusion is based upon these three detailed contentions:

1. The parties agreed in their contract that title should pass upon the happening of a certain event: the giving of a notice by the defendant tendering the price of the hops accepted. This was never done as all were rejected.
2. This transaction was a sale for cash, and title

has never passed to the defendant for the reason that the defendant has never paid for these hops.

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

An explanation of these three contentions is desirable. 1 and 2 are not dependent in any way upon a finding that the defendant was justified in rejecting the plaintiff's hops. These two contentions are operative if such rejection was wrongful. The acceptance of either 1 or 2 is a sufficient basis for a reversal of this judgment and the entry of a judgment for the defendant. 3 is dependent upon a finding by this court that the defendant was justified in rejecting the plaintiff's hops, but 3 need not be considered if either 1 or 2 is sustained. The acceptance of 3 is likewise a sufficient basis for a reversal of the judgment and the entry of a judgment for the defendant.

1. The parties agreed in their contract that title should pass upon the happening of a certain event: the giving of a notice by the defendant tendering the price of the hops accepted. This was never done as all were rejected.

By the use of the words, "Unless a different intention appears," Section 19 of the Act, Section 71-119, O.C.L.A., declares that if the parties agree when title shall pass, such agreement is binding upon both the seller and the buyer, and the Rules found in Section 19 have no application.

Such is the construction placed upon this section by the courts:

*Jeffries v. Pankow,* 112 Or. 439, 229 Pac. 903. (See Appendix 12.)

*Pulkrabek v. Bankers Mortgage Corp.,* 115 Or. 379, 238 Pac. 347. (See Appendix 13.)

*Western Hat & Manufacturing Co. v. Berkner Bros., Inc.,* 172 Minn. 4, 214 N.W. 475.

*Zone Co. v. Service Transportation Co.,* 137 N.J. L. 112, 57 Atl. 2d. 562.

The defendant contends that in the contract we are considering in the present case, the parties have agreed when title should pass. We further contend that by virtue of such agreement title has not yet passed to the defendant in this case.

The material portions of the contract are quoted herewith (Tr. 7, 10):

"First—* * * the seller agrees to cultivate and complete the cultivation of about 20 acres of land * * * and to harvest, cure and bale the hops grown thereon in the said year 1947 in a careful and husband-like manner, and the seller does hereby bargain and sell, and upon ten days' notice in writing therefor, agrees to deliver and to cause to be delivered to the buyer, not later than the 31st day of October of said year f.o.b. cars or in warehouse at Mt. Angel, Oregon, * * * entire crop estimated at twenty thousand pounds (20,000 lbs.) of Cluster hops * * *.

* * * * * *

"Second—* * * upon the said buyer giving said notice to deliver as herein fixed tendering to the seller the full amount of the purchase price thereof

> in lawful money, after deducting any advances made and interest thereon, the title and ownership and the right to the immediate possession of the said hops shall at once vest and be in the said buyer."

The defendant contends that the last clause of that quotation must be construed to mean: When the buyer has inspected the hops presented to it by the seller for inspection, has accepted those which measure up to contract specifications, has given the notice mentioned, or request to deliver, and has tendered to the seller the price of the quantity thus accepted, title to the hops accepted passes to the buyer.

It follows that if all the hops presented to the buyer for inspection are rejected by it, title to none of them passes to the buyer. This is true whether the hops are rejected rightfully or without justification.

Certainly it cannot be said in this case that these parties intended that title to the entire crop should pass to the defendant when the crop was taken to the warehouse and presented for inspection. Instead, it must be concluded that it was their intention that title to none of the hops should pass at that time, but that title to those accepted by the defendant should pass when they were accepted and the price of that amount of hops was tendered to the plaintiff. It cannot be said that these parties intended title to any of the hops to pass until it was determined which of them, if any, were to be accepted and paid for by the defendant.

Inasmuch as the defendant did not accept and request delivery of any of the hops presented to it for

inspection, and did not tender to the plaintiff the price of any such hops, title to none of them passed to the defendant.

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.

There can be no doubt that this was a sale for cash. The contract so provides, in these words (Tr. 10):

> "The buyer does hereby purchase the above described quantity of said hops and agrees to pay therefor by check, draft, or in lawful money of the United States of America, on the delivery thereof and acceptance by the buyer, and within the time and conditions herein provided, the price or prices as aforestated for each pound thereof which shall be delivered to and accepted by the buyer, * * *."

To state this provision more simply, the contract declares that the defendant shall, after its inspection of the hops, accept those which answer the description or warranty stated in the contract, and pay for that quantity upon acceptance. The words "and pay therefor * * * on the delivery thereof and acceptance by the buyer" can lead to no other conclusion. There is no aspect of a credit transaction in this contract.

There are a number of Oregon cases which establish that under these circumstances title has not passed to the defendant, inasmuch as the defendant has never paid for the hops. Three of these will be discussed herein.

*Weyerhaeuser Timber Co. v. First National Bank of Portland,* 150 Or. 172, 38 Pac. 2d. 48, 43 Pac. 2d. 1078.

That was a suit to recover the proceeds of several shipments of lumber. The plaintiff sold such lumber to the buyer who resold it and shipped it to the east coast. Before the lumber reached its destination in the east, the plaintiffs, because of the insolvency of the buyer, exercised their right of stoppage in transitu. By agreement of all parties, however, the lumber was released to the eastern purchasers upon payment of the price by them, and it was agreed that all parties should have the same rights in the proceeds as in the lumber itself. The defendant bank had loaned money to the buyer on the security of the shipping documents. The buyer's receiver was also a party defendant.

The original transaction was a cash sale, as the contract provided: "Terms 98% Cash in Exchange for Documents." The court said that the sale was one for cash on delivery of documents and that no credit was extended by the plaintiffs. The court added that the transaction was not altered by the fact that the buyer did not pay cash on delivery of the documents, inasmuch as the plaintiffs did nothing to indicate that they waived their right to immediate payment. In modifying and affirming a decree for the plaintiffs, the court held that title did not pass to the buyer as he failed to pay for the lumber. (See Appendix 14.)

One of the most significant sentences in the last paragraph of that quotation is the one stating that if a seller delivers property pursuant to a cash, or cash on delivery, sale, but the buyer wrongfully violates his promise to pay for the goods, the buyer does not acquire

title. This means that title does not pass to the buyer whether he is justified in refusing to pay for the goods or not, in sales of that type.

*Keegan v. Lenzie,* 171 Or. 194, 135 Pac. 2d. 717. That was an action brought by the seller of a quantity of lambs, against the defendant who had purchased them from the original buyer. The plaintiff sought to recover the unpaid portion of the price on the ground that the original buyer had not paid him for them and had never acquired title. The court held that the complaint stated a cause of action in assumpsit based upon a conversion by the defendant and a waiving of the tort by the plaintiff. The defendant was a bona fide purchaser and no fraud was alleged on the part of anyone.

The original transaction here also was a sale for cash. The plaintiff alleged in his complaint that an advance payment was made by the buyer and that it was agreed that the remainder of the price would be paid on delivery of the lambs. The court decided that title to the lambs did not pass to the buyer, and that the plaintiff was entitled to recover from the defendant, saying:

> "If, as the court found, the transaction was a cash sale and the parties intended that title should not pass until payment was made, and no payment was made, then title to the property did not pass by mere delivery, and it is immaterial what motive Boylen (the original buyer) had in giving the drafts, or whether he was actuated by fraud or not."

The defendant contended that the delivery of the lambs to the original buyer was an unconditional ap-

propriation of the goods to the contract, citing *John Hancock Mutual Life Insurance Co. v. Lewis Realty Co.,* 173 Wash. 444, 23 Pac. 2d. 572. The court then quoted subdivisions (1) and (2) of Rule 4 of Section 19 of the Act, Section 71-119, O.C.L.A., and Section 20(1) of the Act, Section 71-120(1), O.C.L.A., and then answered this contention of the defendant in these words:

> "The right of property in the goods in this case having been reserved by the contract, *John Hancock Mutual Life Ins. Co. v. Lewis Realty Co.,* supra, is not authority for defendant's contention.
> "We conceive the rule to be that appropriation of the goods to the contract does not by itself effect a transfer of title. Whether or not title passes depends upon the intention of the parties. 24 R.C.L., Sales, sec. 300."

*Mogul Transportation Co. v. Larison,* 181 Or. 252, 181 Pac. 2d. 139. There the court stated the same rule with respect to the passing of title. (See Appendix 15.)

The following conclusions may be drawn from these three cases:

(a) Where there is a sale for cash, it must be conclusively presumed that the parties intended that title should not pass to the buyer until the price has been paid. It follows that this intention must be given effect and that none of the Rules in Section 19 of the Act, Section 71-119, O.C.L.A., can be applied.

(b) Where there is a sale for cash, it must be said that the seller has reserved the right of property in the goods until payment has been made, within the mean-

ing of Section 20(1) of the Act, Section 71-120(1), O.C. L.A. That section provides that this may be done although the goods are delivered to the buyer or a bailee for the purpose of transmission to the buyer.

It is respectfully contended that since the defendant has not paid for these hops, title to them has not passed to it, and this is true whether the defendant was justified in refusing to pay for them or not.

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

The defendant contends that there has been no compliance with Section 19, Rule 4(1) of the Act, Section 71-119, Rule 4(1), O.C.L.A., the part of the Act which contains the rules by which it may be determined when title to goods passes from the seller to the buyer in the absence of agreement. (See Appendix 10.)

Two clauses found in Rule 4(1) will be briefly considered.

(a) "* * * goods of that description (stated in the contract) and in a deliverable state are unconditionally appropriated to the contract, * * *."

"That description" means: of the kind, quality, and condition described in the contract. Goods are "in a deliverable state," when by reason of Section 76(4) of the Act, Section 71-176(4), O.C.L.A., "they are in such a state that the buyer would, under the contract, be bound to take delivery of them." (See Appendix 16.)

It is clear, therefore, that title to goods tendered by a seller to a buyer, cannot pass to the latter by operation of Section 19, Rule 4(1), unless the goods so tendered are of such kind, quality and condition that the buyer is bound to take delivery of them, under the contract.

It has already been demonstrated in the argument under headings I and II that the hops tendered to the defendant were such that the defendant was not bound to take delivery of them.

*Wright v. Ramp,* 41 Or. 285, 68 Pac. 731.

It follows that these hops were not in a deliverable state and that title did not pass upon the appropriation of the hops to the contract.

*Corbett v. A. Freedman & Sons, Inc.,* 263 Mass. 391, 161 N.E. 415.

*Baker v. J. C. Watson Co.,* 64 Idaho 573, 134 Pac. 2d. 613.

(b) "* * * goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, * * *."

It is established that if goods are delivered, with the assent of the buyer, to a carrier for shipment to the buyer, or to a warehouse or other bailee for the buyer, this is deemed to be an appropriation with assent within the meaning of Section 19, Rule 4(1) of the Act, Section 71-119, Rule 4(1), O.C.L.A., and title passes to the buyer upon delivery to the carrier or to the bailee.

It is also established, however, that this is a conditional title. The buyer, in the absence of an agreement to the contrary, is entitled to inspect the goods upon their arrival at their destination or at the warehouse of the bailee, by reason of the provisions of Section 47 of the Act, Section 71-147, O.C.L.A. (See Appendix 17.) In the present case, of course, the defendant was given the right to inspect the hops by the express terms of the contract (Tr. 10).

If the goods delivered to the carrier or to the bailee prove to be, upon inspection, of such kind, quality, or condition that they are not in a deliverable state, they may be rejected by the buyer and the conditional title is defeated with the result that the seller cannot maintain an action for the price.

*Kitterman v. Eagle Pine Co.,* 122 Or. 137, 257 Pac. 815. That was an action for the price of a quantity of lumber sold in part for cash and in part on credit. The sole question presented on the appeal was whether the defendant's right of inspection continued until the lumber reached its destination in the east, or whether that right was lost through failure to exercise it at an earlier time. The plaintiffs, in effect, admitted that the lumber was not of the quality contracted to be sold, as they conceded that judgment should be rendered against them if the defendant's right of inspection continued to the point of final destination. The trial court entered a judgment for the plaintiffs. On appeal this judgment was reversed and a judgment was rendered in favor of the defendant.

The court made the following statement with respect to the question of the passing of title to the defendant:

> "It is true that the title to the lumber passed to the defendant when it was delivered at Grants Pass, but it was a conditional title, subject to be defeated by failure of the seller to deliver the kind and quality of lumber agreed to be sold."

These principles are also established by the courts of other states.

> *Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co.,* 233 Mich. 298, 206 N.W. 331. (See Appendix 18.)
>
> *Olsen v. McMaken & Pentzien,* 139 Neb. 506, 297 N.W. 830.
>
> *Hostler Coal & Lumber Co. v. Stuff,* 205 Ia. 1341, 219 N.W. 481.

It is clear that in Oregon, at least, their application is limited to sales which are not for cash or cash on delivery. This is settled by the cases discussed in subdivision 2 under this heading IV.

Inasmuch as it has been demonstrated in the present case, in the argument under headings I and II, that the hops tendered by the plaintiff to the defendant were not in a deliverable state and the defendant was not bound to accept delivery of them, the rejection of the plaintiff's hops was justified and the conditional title which passed to the defendant was defeated and terminated, with the result that the plaintiff cannot maintain this action for the price.

One sentence in Paragraph 7 of the Findings of Fact

(Tr. 37), must be challenged:

> "In September, 1947, after said hops had been picked, dried, cured and baled as aforesaid, plaintiff with the assent of the defendant, delivered at Schwab's warehouse in Mt. Angel, Oregon, all of said hops and set same aside for defendant."

This sentence was probably designed by counsel for the plaintiff to meet the requirements of Section 19, Rule 4(1), of the Act, Section 71-119, Rule 4(1), O.C. L.A., which declares that, unless a different intention appears, where there is a contract to sell future goods by description, title to such goods passes to the buyer upon the appropriation of the goods to the contract by the seller with the assent of the buyer. (See Appendix 10.) This finding is subject to two meanings, and is wholly unsupported by the evidence regardless of which is adopted:

(a) The defendant assented to the appropriation of the hops to the contract by agreeing in advance to the delivery of the hops to the warehouse.

If this is the meaning intended, the finding is incomplete, misleading, and contrary to the undisputed evidence. It is established by *Kitterman v. Eagle Pine Co.,* supra, the Michigan, Nebraska and Iowa cases just cited, and *Henry Glass & Co. v. Misroch,* 239 N.Y. 475, 147 N.E. 71, that while delivery to a carrier or warehouse pursuant to agreement, does amount to an appropriation with assent, such assent is subject to withdrawal and is withdrawn if, following an inspection, the goods are rejected because not of the quality or condition described in the contract. In other words, the title

which passes by reason of the implied assent to the appropriation, is conditional and is defeated by a subsequent rejection of the goods based upon their inferior quality or condition.

This is explained by the court in *Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co.,* supra. (See Appendix 18.)

It is undisputed in the present case that there was a rejection for the reasons stated, consequently it must be said that the assent to the appropriation was withdrawn if the hops were actually of inferior quality or condition.

It must be concluded, therefore, that this finding, as construed in (a), is wholly without evidentiary support if the plaintiff's hops failed to meet the description in the contract.

(b) The defendant actually expressed assent to the appropriation of the hops to the contract, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff.

There is no evidence whatever in support of this finding, as so construed. The only evidence bearing on this question is that the defendant rejected the hops and thereby expressed a decided unwillingness to take them as its own.

It follows that it must be said that title has not passed to the defendant within the meaning of Section 63(1) of the Act, Section 71-163(1), O.C.L.A.

## V

## THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PROPERTY IN THE PLAINTIFF'S CLUSTER HOPS PASSED TO THE DEFENDANT, AND THAT THE DEFENDANT BECAME OBLIGATED TO PAY THE AMOUNT DUE UNDER SAID CONTRACT LESS THE AMOUNT REALIZED FROM THE RESALE OF THE HOPS

This is established by the argument under heading IV, which is incorporated herein by reference.

## VI

## THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE CONTRACT ITSELF PRECLUDES THAT MEASURE OF RECOVERY

It will be assumed for the purpose of presenting the argument under this heading, that the hops tendered to the defendant were of prime quality, and the defendant breached the contract in rejecting them.

For the convenience of the court, the provision in the contract with respect to the measure of damages in the event of a breach by either party, is quoted in full (Tr. 13):

> "The parties hereto further agree that upon the breach of the terms of this contract by either party, the difference between the contract price of said hops and the market value thereof at the time and place of delivery shall be considered and is hereby agreed to be the measure of damages, which may be recovered by the party not in default for such breach, and the said difference between the said contract price and the market value thereof is hereby agreed and fixed and determined as liquidated damages."

A study of the entire contract makes it clear that the "time and place of delivery" referred to in this clause means the time of delivery of the said hops to the warehouse and the place of such warehouse.

The defendant contends that the quoted provision of this contract relating to the measure of damages, is binding upon the plaintiff, and, as a result, that he is precluded from recovering the price of such hops and is limited in his recovery to the difference between the contract price selected by him and the market value at Mt. Angel, Oregon, on the date of delivery of the hops to the warehouse in that city. Inasmuch as the contract price of the plaintiff's hops and the market value of prime quality hops were exactly the same, at the time and place of delivery, the plaintiff was not damaged to any extent whatever and is not entitled to recover anything in this action (Tr. 246, 247, 254, 255, 361, 362, 363, 404, 405, 416, 419; Exhibit 33, Tr. 285). Certainly he is not entitled to recover the price, and he has made no attempt to recover the difference between the contract price and the market value.

The Uniform Sales Act recognizes the right of parties to enter into binding contracts modifying the rights and liabilities created by that Act.

Section 71 of the Act, Section 71-171, O.C.L.A., contains this language:

> "Where any right, duty or liability would arise under a contract to sell or a sale by implication or law, it may be negatived or varied by express agreement or by a course of dealing between the parties, or by custom, if the custom be such as to bind both parties to the contract or the sale."

This section has been relied upon by the courts to sustain contract provisions specifying a measure of damages different from the measure of damages created by the Act.

> *International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325, 229 N.W. 22.
>
> *The Christian Mills, Inc. v. Berthold Stern Flour Co.,* 247 Ill. App. 1.
>
> *Crandall Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co.,* 188 Wash. 1, 61 Pac. 2d. 136.

The quoted provision with respect to damages in the present case is really not a provision for "liquidated damages" as that term is ordinarily understood. Usually, though not always, the courts refer to liquidated damages as a certain amount which one party is entitled to recover by contract, upon the breach of the other.

Inasmuch as the measure of damages specified in the contract we are considering, is practically identical to that stated in Section 64 of the Act, Section 71-164,

O.C.L.A., (See Appendix 19), it appears that this contract provision is, in reality, one limiting the liability of the defendant to an action for damages for breach of the contract, and precluding the plaintiff from maintaining an action for the price. In other words, by this provision, the plaintiff agreed that he would not be entitled to maintain an action for the price if the defendant breached the contract.

Provisions of this sort limiting liability and precluding one party from adopting a particular measure of damages, are valid and enforceable.

*Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958. The contract clause in that case provided:

> "* * * and should the buyers fail on their part to accept and pay for the hops herein agreed to be sold, the seller not being in default in the terms and conditions to be by him kept and performed, the seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops, as herein specified, and the market value of the kind and quality in this contract mentioned * * *."

The court held that the buyer was limited to the measure of recovery so specified. (See Appendix 20.)

*Crandall Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co.,* 188 Wash. 1, 61 Pac. 2d. 136. The contract provided that the seller's obligation under a warranty set forth therein was limited to replacing any part demonstrated to be defective. The contract declared that such warranty was in lieu of all other war-

ranties, express or implied. The seller, upon complaint being made by the buyer, replaced a gear in the machine sold. In denying any recovery to the buyer for breach of warranty, the court held that inasmuch as the seller complied with the obligation to replace the gear, the seller was not subject to a liability which it expressly disclaimed. The basis of the decision was that the Uniform Sales Act expressly recognizes the right of parties to contract either in compliance with or contrary to the provisions of the Act. The court stated that in the absence of fraud or other invalidating cause, it was bound to give effect to the contract between these parties. (See Appendix 21.)

*Graves Ice Cream Co. v. Rudolph W. Wurlitzer Co.,* 267 Ky. 1, 100 S.W. 2d. 819. The Uniform Sales Act applied to this case also. The contract for the sale of a refrigerating machine provided that if the condensing unit proved to be unsatisfactory, the seller would remove it and refund to the buyer the money paid for it. The unit was unsatisfactory and the seller did remove it and refund the money. This was an action for damages for breach of an implied warranty. The contract contained the clause, "This covers all promises express or implied." The court stated that this provision negatived an implied warranty and precluded the buyer from maintaining an action for damages for breach of such a warranty.

*Nostdal v. Morehart,* 132 Minn. 351, 157 N.W. 584. The defendant agreed to convey certain land to the plaintiff. The contract contained a term that if the

vendor's title could not be made good, the contract would be inoperative and the vendee would be limited to a recovery of the consideration paid by him to the vendor. The latter was unable to convey a good title and the vendee brought this action against him for damages, seeking to recover the difference between the contract price and the market value, in addition to the consideration paid. The plaintiff secured a judgment in the trial court but only for the amount paid by him to the defendant, with interest. The judgment was affirmed. The court held that while the difference between the market value and the contract price is an ordinary measure of damages, the parties can fix a different measure. (See Appendix 22.)

*Riggs v. Gish,* 201 Ia. 148, 205 N.W. 833. This was an action on a lease in which the lessee counterclaimed for damages arising out of the failure of the lessor to tile the land as agreed. The lessor had agreed in writing to pay damages up to "one dollar and fifty cents ($1.50) to two dollars and fifty cents ($2.50) per acre" for failure to tile the property. The trial court submitted to the jury the usual measure of damages, the difference between the rental value of the property, properly tiled, and the rental value of the property in its actual condition, but limited the recovery to a maximum amount of $2.50 an acre. On appeal, this measure of damages was held to be proper. (See Appendix 23.)

The mere use of the expression "liquidated damages," in the contract we are considering, does not prevent a construction of the contract to preclude an action for

the price. Some courts, in actions involving the sale of goods, have referred to provisions of this sort as actually permitting the recovery of liquidated damages. If this provision should be so regarded, it is not invalid but is enforceable for the reason that it does not impose a penalty upon the plaintiff but appears to be a good faith attempt to authorize him to recover fair compensation.

> *Sheffield-King Milling Co. v. Domestic Science Baking Co.,* 95 Oh. St. 180, 115 N.E. 1014.

If this contract provision is regarded as one authorizing the recovery of liquidated damages, it is unimportant that the measure of damages specified is as indefinite as the corresponding statutory measure of damages.

> *Sheffield-King Milling Co. v. Domestic Science Baking Co.,* supra.
>
> *International Milling Co. v. North Platte Flour Mills,* 119 Neb. 325, 229 N.W. 22.

In both of the cases last cited, in actions brought under the Uniform Sales Act, it was held that the sellers were entitled to recover damages from the buyers in accordance with the terms of the contracts between the parties, in the face of objections by the buyers that they were liable only in accordance with the measure of damages provided in the Sales Act.

In conclusion, we respectfully contend that these authorities establish that the plaintiff cannot recover the price in this action, as he is limited to a recovery in accordance with the terms of the contract.

This means that there can be no recovery whatever by the plaintiff in this action, but it does not follow that this result imposes any undue hardship on him. It is undisputed that there was a good market for prime quality hops throughout 1947, and that the market price did not begin to fall until the latter part of November of that year. If the plaintiff's hops were of prime quality, he could have sold them readily, and without any loss whatever, after his hops were rejected by the defendant.

## VII

## THE COURT ERRED IN FAILING AND REFUSING TO GRANT THE DEFENDANT'S MOTION TO DISMISS ON THE GROUND STATED IN PARAGRAPH 1 THEREOF (TR. 23, 26), AND IN FAILING AND REFUSING TO SUSTAIN THE FIRST DEFENSE IN THE DEFENDANT'S ANSWER (TR. 28)

This is established by the argument under heading VI, which is incorporated herein by reference.

## VIII

## THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE MEASURE OF THE PLAINTIFF'S RECOVERY UPON THE FACTS HERE IS, UNDER OREGON LAW, THE DIFFERENCE BETWEEN THE AMOUNT DUE UNDER SAID CONTRACT AND THE AMOUNT REALIZED FROM THE RESALE OF THE HOPS

This is established by the argument under heading VI, which is incorporated herein by reference.

## IX

## THE DEFENDANT IS ENTITLED TO A JUDGMENT AGAINST THE PLAINTIFF ON ITS COUNERCLAIM (TR. 30), FOR $4,000, THE AMOUNT OF THE ADVANCE, IN THE EVENT THE JUDGMENT IS REVERSED

The contract clearly contemplates that if, for any justifiable reason, the defendant does not accept and pay for any of the plaintiff's hops, the plaintiff is obligated to repay the amount of the advance, $4,000. The contract states (Tr. 11):

> ". . . . the buyer will advance and loan to the seller such sums of money as may be required by the seller to defray the necessary expenses of cultivating and picking such hops, and of harvesting and cur-

ing the same. . . . Said advances to be paid in the following manner: . . . $4,000.00 on or about September 1, 1947."

This advance was made by the defendant and has not been repaid (Tr. 98). It is acknowledged, in effect, by counsel for the plaintiff that if the judgment is reversed, a judgment should be entered in favor of the defendant and against the plaintiff on the counterclaim for $4,000 (Tr. 127, 128, 129).

Under these circumstances the defendant is entitled to such judgment in the event of a reversal.

*Netter v. Edmunson,* 71 Or. 604, 143 Pac. 636.

*Pinnacle Packing Co. v. Herbert,* 157 Or. 96, 70 Pac. 2d. 31.

*Humphrey v. Sagouspe,* 50 Nev. 157, 254 Pac. 1074.

## CONCLUSION

The defendant respectfully prays that the judgment be reversed and that a judgment be entered on its counterclaim in favor of the defendant and against the plaintiff, for $4,000.

Respectfully submitted,

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ROBERT M. KERR,
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Attorneys for Appellant.

## APPENDIX

1. *Netter v. Edmunson,* 71 Or. 604, at 611, 143 Pac. 636, at 638:

> "An application of scientific methods may have demonstrated that the rejected hops would have made excellent beer, quite equal to those specified in the contract as first quality. Yet the defendants were under a legal obligation to deliver to plaintiffs hops of a kind and quality described in the contract. As a matter of common understanding, hops have a commercial value corresponding to the grade which they occupy, and are bought and sold on that basis. The kinds of grades and the manner of their graduation are known to all engaged in the hop industry and its allied concomitants. Therefore the contract under consideration defined the hops to be produced in terms which must be taken as the yardstick by which to measure their quality."

2. *Netter v. Edmunson,* 71 Or. 604, at 613, 143 Pac. 636, at 639:

> "The next error presented on appeal involves the refusal of the court to give certain instructions requested by plaintiffs, to the effect that if the hops were affected by a vermin damage, not of good or even color, fully matured, cleanly picked, or properly dried or cured, to the extent that defendants could not furnish 30,000 pounds, free from such defects, the hops were not of the quality described in the contract. These instructions should have been given. This litigation had its inception in the differences that existed between the contracting parties with respect to the quality of the hops. We think the description of the hops as specified in the contract was determinative of their quality."

3. *Wigan v. LaFollett,* 84 Or. 488, at 502, 165 Pac. 579, at 584:

> "Now as to the quality of these hops contracted to be delivered, the contract says that these hops, first, are not to be the product of the first year's planting, second, not to be affected by spraying or mold, third, they should be of good color, fully matured, cleanly picked, fourth, free from damage by vermin, properly dried and cured, not broken, in good order and condition; otherwise known as prime quality. You are to accept the definition of prime quality as laid down in this contract by the parties themselves. You are, however, to consider these terms as used in this contract in the ordinary meaning and acceptation of those terms. You are to give them such a reasonable construction and meaning as are placed upon them by persons who are engaged in the hop business."

4. *Lilienthal v. McCormick,* 86 Fed. 100, at 101:

> "The allegation that the defendants tendered 30,000 pounds of hops, of an average of the best product of said crops so produced, etc., and that they exerted their utmost to procure and produce crops of choice quality, and in sound condition, of good color, fully matured, etc., does not show a compliance with the requirements of the contract. The latter part of this allegation merely shows an attempt to comply with the contract, by an utmost exertion to procure a crop of hops of the quality required. The allegation that the crops tendered were an average of the best product of said crops so produced does not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc. The tender was of an average of the best product of the crop produced, while the obligation was to deliver, absolutely, hops of choice quality, and in sound condition, good color, fully matured, etc."

5. Restatement of the Law of Contracts, Section 281:

> "In promises for an agreed exchange, a promisor is discharged from the duty of performing his promise if substantial performance of the return promise is impossible because of the non-existence, destruction or impairment of the requisite subject-matter or means of performance, provided that the promisor has not himself wrongfully caused the impossibility or has not assumed the duty that the subject-matter or means of performance shall exist unimpaired."

The following example of the application of this Section is stated under the heading "Illustrations":

> "1. A contracts to sell and B to buy 200 tons of potatoes to be grown during the ensuing season on a specific tract of land. B promises to pay half the price on July 1 of that season, and the remainder on delivery of the potatoes. The potatoes, though duly planted, are blighted before July 1. B is under no duty to make payment."

6. *Johnson v. Associated Oil Co. of California,* 170 Wash. 634, at 637, 17 Pac. 2d. 44, at 45:

> "The offer to prove that respondent breached a like contract with some one other than appellants and later adjusted its differences with that agent in a certain manner should likewise have been rejected. Such breaches and adjustments would not conclude either the appellants or the respondent as to the terms of the contracts in the case at bar."

7. *Wright v. Ramp,* 41 Or. 285, at 289, 68 Pac. 731, at 732:

> "There is no finding that the monument was of the kind called for by the contract, or that it was such a one as the defendant (the buyer) was bound to

receive and accept, and, until that question is determined in favor of the plaintiff (the seller), he is not entitled to recover as for a breach of contract."

8. *Hurley Gasoline Co. v. Johnson Oil Refining Co.*, 118 Okla. 26, at 28, 246 Pac. 438, at 439:

"The defendant (the seller) guaranteed the gasoline at point of destination to be 'water white,' and it was 'yellow,' and no obligation rested upon the plaintiff (the buyer) to accept the same. If one orders white paint, and the seller delivers yellow paint, it is true the yellow paint may cover as much surface of the house or barn, but it is not what the buyer ordered, and delivery wholly failed, and the buyer is not compelled to accept and use the yellow paint and sue for the difference between the price of the two colors of paint. The one is wholly unfit for his purpose, and he may reject it and insist on a literal compliance with the terms of the contract."

9. Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A.:

"(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

* * * * *

"(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as

the buyer's and may maintain an action for the price."

10. Section 19 of the Uniform Sales Act, Section 71-119, O.C.L.A.:

"Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:

* * * * *

"Rule 4. (1) Where there is a contract to sell unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer upon the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

"(2) Where, in pursuance of a contract to sell, the seller delivers the goods to the buyer, or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to or holding for the buyer, he is presumed to have unconditionally appropriated the goods to the contract, except in the cases provided for in the next rule and in section 71-120. This presumption is applicable, although by the terms of the contract, the buyer is to pay the price before receiving delivery of the goods, and the goods are marked with the words 'collect on delivery' or their equivalents."

11. Section 20 of the Uniform Sales Act, Section 71-120, O.C.L.A.:

"(1) Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the

contract or appropriation, reserve the right of possession or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer.

"(2) * * * * * * *."

12. *Jeffries v. Pankow*, 112 Or. 439, at 458, 223 Pac. 745, 229 Pac. 903, at 908:

"It was avowedly agreed by the parties that time was the essence of the contract and that title should not pass to the buyer until any and all judgments obtained thereon were paid and satisfied in full and all conditions and stipulations in this agreement were fully performed. * * * It was competent for the parties to make such a contract. It takes the matter out of the operation of the rules for ascertaining the intention of buyer and seller relative to the passing of the title as expressed in that portion of the Uniform Sales Act codified in Section 8182, Or. L. (Section 19 of the Act, Section 71-119 O.C. L.A.)"

13. *Pulkrabek v. Bankers' Mortgage Corp.*, 115 Or. 379, at 388, 238 Pac. 347, at 350:

"Section 8182, Or. L. (Section 19 of the Act, Section 71-119, O.C.L.A.), prescribes the rules for ascertaining the intention of the parties as to the time when the property in the goods passes to the buyer, unless a different intention appears. Rules 1, 2 and 5 thereof prescribe as follows: * * * Under these statutory provisions, the intention of the parties to a contract for the sale of specific goods, such as are involved here, is controlling upon the question of when the title to the goods passes if such intention can be collected from the terms of the contract itself or

from the conduct of the parties, the usages of trade, or the facts and circumstances of the case. But, if such intention cannot be determined by those means, then the rules provided by the statute for making such determination are controlling."

14. *Weyerhaeuser Timber Co. v. First National Bank of Portland,* 150 Or. 172, at 194, 38 Pac. 2d. 48, at 55, 43 Pac. 2d. 1078:

"Plaintiffs had a right to reclaim the lumber irrespective of their right of stoppage in transitu. Where the sale is for cash and the purchase price is not paid, the title, notwithstanding delivery, does not pass from the seller, and in the absence of a waiver or estoppel the seller may reclaim the goods, either from the buyer or from a third party claiming under the buyer. The buyer having no title himself can pass none, even to an innocent purchaser for value: (citation of authorities).

* * * * *

"Delivery and payment are concurrent conditions unless otherwise agreed: Section 64-502, Oregon Code 1930 (Section 71-142, O.C.L.A.). * * * The property in goods passes when parties so intend: Section 64-402, Oregon Code 1930 (Section 71-118, O.C.L.A.).

"The appellants contend that the plaintiffs waived the payment of cash upon delivery of documents. A prior course of conduct under previous contracts will not operate as a waiver of an express stipulation in a new contract. To constitute a waiver of the condition of payment, there must be not only an act of delivery but also an intent not to insist on immediate payment as a condition of the title passing. In a cash, or cash on delivery sale, if the seller delivers but the buyer violates his promise to pay, the buyer does not acquire title: (cases cited). And after delivery the title remains in the seller until

payment unless he waives the right to treat the sale as a cash transaction: (cases cited)."

15. *Mogul Transportation Co. v. Larison,* 181 Or. 252, at 259, 181 Pac. 2d. 139, at 143:

"Assuming that a price was agreed upon, there is no dispute between the parties upon the fact that the transaction was to be a cash sale. In such a sale, payment and delivery are concurrent acts. Title to the property does not pass until payment, and, if the buyer has taken possession without paying the price, the seller, unless he has waived concurrent payment, may reclaim the property if, in the interim, rights of innocent third persons have not intervened."

16. Section 76(4) of the Uniform Sales Act, Section 71-176(4), O.C.L.A.:

"(4) Goods are in a 'deliverable state' within the meaning of this act when they are in such a state that the buyer would, under the contract, be bound to take delivery of them."

17. Section 47 of the Uniform Sales Act, Section 71-147, O.C.L.A.:

"(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

"(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

"(3) * * * * * * *."

18. *Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co.,* 233 Mich. 298, at 302, 206 N.W. 331, at 332:

"But delivery and the passing of title at the point of shipment does not preclude the buyer from inspecting and rejecting at the point of destination, if the goods when delivered are not such as are stipulated in the contract. It has uniformily been held that under such circumstances as between the seller and the buyer the title which passes is a conditional title, subject to the right of inspection and rejection at the point of destination."

19. Section 64 of the Uniform Sales Act, Section 71-164, O.C.L.A.:

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance.

"(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.

"(3) Where there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

20. *Daniels v. Morris,* 65 Or. 289, at 297, 130 Pac. 397, at 399, 132 Pac. 958:

"It is contended by the defendant that the plaintiffs' refusal to take the hops was an abandonment of the contract, and therefore a forfeiture of the advances made; but the damages for breach of the

contract by plaintiffs is fixed by the contract, namely: 'The seller shall be entitled to receive as liquidated and ascertained damages for such breach on the part of the buyers, the difference between the contract price of said hops as herein specified, and the market value * * * on the 31st day of October, 1910.' This, we think, is intended to cover all forfeitures and damages, and that defendants must account for the advances received by them and offset the same against the damages in the contract provided for."

21. *Crandall Engineering Co. v. Winslow Marine Ry. & Shipbuilding Co.,* 188 Wash. 1, at 17, 61 Pac. 2d. 136, at 143:

"It will thus be seen that, while the Uniform Sales Act provides the remedy or relief for breach of warranty, it also specifically provides that the parties may contract with reference thereto.

"In this case, the contract as finally made by the parties expressly provided that appellant's obligation under the warranty was limited to replacing any part demonstrated to have been defective, that such warranty was in lieu of all other warranties, express or implied, and that no other liability in connection with the goods was assumed by the appellant.

"The uniform sales act expressly recognizes the right of parties to contract either in compliance with, or else contrary to, the provisions of the act, and, in the absence of fraud or other invalidating cause, gives effect to such contract. The parties, having made the contract, are bound by it. The appellant, having complied with the obligation assumed by it, is not subject to a liability which it has expressly disclaimed."

22. *Nostdal v. Morehart,* 132 Minn. 351, at 352, 157 N.W. 584, at 585:

"This provision, standing alone, is clear and unequivocal. * * * It means that if the title which the vendor can convey to the purchaser is not good, and cannot in the exercise of good faith on the part of the vendor be made good, then the agreement is to be at an end as to both parties, and the purchase money paid is to be refunded. This remedy so fixed by the contract is exclusive of all others. It is binding on both parties and either party has a legal right to invoke it."

23. *Riggs v. Gish,* 201 Ia. 148, at 155, 205 N.W. 833, at 836:

"The measure of damages adopted by the court made it possible for the jury to give substantial effect to the intentions of the parties as therein expressed. * * * There is no reason why the parties, if they desired to do so, might not agree upon a basis for settling damages. As the amount was not specifically agreed upon, the damages were not liquidated, but a maximum recovery was fixed. The court gave practical effect to the agreement."